Supreme Court, U.S.
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No. _____

In The Supreme Court Of The United States

OCTOBER TERM 1997

BVP MANAGEMENT ASSOCIATES,
Petitioner,

v.

ROBERT FREDETTE,
Respondent.

On Petition For Writ of Certiorari To The United States Court of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the language of Title VII, when viewed in the light of the Congressional intent behind that statute, authorize claims of same-sex sexual harassment?

If the answer to the above question is "yes", do cases involving sexual harassment by a homosexual require different treatment from cases involving sexual harassment by heterosexuals or persons whose sexuality is not established?

CERTIFICATE OF INTERESTED PARTIES

In compliance with this Court's Rules 14(b) and 29.6, Petitioner BVP Management Associates lists the following parties, parent companies and non-wholly owned subsidiaries in addition to the interested parties already listed in the caption of this case:

1. Buena Vista Hospitality Group, Defendant (dismissed)*

2. Royal Palace Hotel Associates, Defendant (dismissed)*

3. Sunshine, Dana, Defendant (dismissed)

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 112 F.3d 1503 (11th Cir. 1997), and is reproduced in the Appendix at "A". The Judgment of the United States District Court for the Middle District of Florida is reproduced in the Appendix at "B". The opinion of the United States District Court for the Middle District of Florida is reported at 905 F. Supp. 1034 (M.D.Fla. 1995), and reproduced in the Appendix at "C". The Magistrate's Report and Recommendation is reproduced in the Appendix at "D".

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its judgment on May 22, 1997. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 2000e-2 provides, in pertinent part:

(a) Employer Practices. It shall be an unlawful employment practice

for an employer --

(1) To fail or refuse to hire or to discharge any individual, or otherwise

to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race,

color, religion, sex, or national origin.

STATEMENT OF THE CASE

A. Basis of Jurisdiction In The First Instance And Procedural History

Respondent Robert Fredette (hereinafter "Fredette"), filed this action on March 17, 1994, in the United States

District Court for the Middle District of Florida. His original complaint contained three counts, one under 42 U.S.C. § 2000e *et seq.* (hereinafter "Title VII"), one under the Florida Human Rights Act, Fla. Stat. § 760.01 *et seq.*, and one under 29 U.S.C. § 201 (hereinafter "the Fair Labor Standards Act"). His allegations under Title VII and the Fair Labor Standards Act provided federal question jurisdiction for the United States District Court. 42 U.S.C. § 2000e-5(f)(3). His claims under Title VII and the Florida Human Rights Act were grounded in alleged sexual harassment by his male supervisor to which he was allegedly subjected while an employee of the Buena Vista Palace Hotel. Petitioners BVP Management Associates, *et al.* (hereinafter "BVP") moved on May 9, 1995 for summary judgment on the ground that Title VII and the Florida Human Rights Act do not encompass claims of "same-sex" sexual harassment.

United States District Judge G. Kendall Sharp granted BVP's Motion with respect to Counts I and II of the Complaint on September 11, 1995, holding that "[a]ny expansion of Title VII or the FHRA that would include such a cause of action is for either Congress or the Florida legislature, and not this court, to make." Appendix C at 6. On September 20, 1995, Fredette voluntarily dismissed with prejudice Count III of the Complaint, his claim under the Fair Labor Standards Act. The district court closed the case on September 20, 1995.

Fredette filed an appeal with the United States Court of Appeals for the Eleventh Circuit on September 21, 1995. The Court of Appeals issued an order reversing the judgment of the District Court on May 22, 1997. Petitioners filed a Motion to Stay the Mandate of the Court of Appeals on June 12, 1997. BVP's Motion was granted on July 9, 1997, to extend until August 20, 1997, or until the filing of this Petition.

B. Facts

BVP operates the Buena Vista Palace Hotel, a 1,028-room hotel located at Lake Buena Vista, Florida. In addition to providing rooms to the public, the hotel also contains three restaurants. One restaurant, Arthur's 27, offers fine dining and has received a four-diamond rating from the American Automobile Association and a five-star rating from the International Restaurant Rating Bureau in recognition of providing superior food and service.

Food and beverages are served to customers of Arthur's 27 by servers working in two-person teams. One server, who is designated a "captain", has primary responsibility for communicating with guests, taking orders and assuring that food and beverages are served in a timely and professional manner. The other server, referred to as a "back waiter", generally is responsible for assuring that food and beverages are served promptly. Servers report to the maitre d'hotel or manager of the

restaurant. Mr. Dana Sunshine was the maitre d'hotel or manager of Arthur's 27 from 1988 until 1994.

Mr. Fredette worked as a server in Arthur's 27 from April 1989 until he resigned in February 1993. During this time, he was either the first or second most highly compensated waiter in Arthur's 27. Until he commenced a leave of absence to seek treatment for alcohol abuse in January 1993, Mr. Fredette never complained about any alleged sexual harassment, even though he had received BVP's Employee Handbook and was well aware of the hotel's policy which both prohibited sexual harassment and provided employees with a means of reporting such harassment.

Six months after he began his employment at Arthur's 27, Mr. Sunshine promoted Mr. Fredette to captain. He held this position until he voluntarily resigned his employment on February 6, 1993.

On January 3, 1993, Mr. Fredette went to Arthur's 27 on his day off, became drunk and then created a loud scene when the bartender refused to serve him any more alcohol. In view of his drunken and disorderly behavior at a hotel restaurant, Mr. Fredette's employment was suspended pending an investigation.

On January 5, 1993, Mr. Fredette met with the hotel's Manager of Human Resources, David Mitchell. At this time, Mr. Mitchell and Mr. Fredette discussed the latter's behavior. Mr. Fredette mentioned nothing about sexual harassment to Mr. Mitchell, nor did he contradict the Disciplinary Action form that described the January 3 incident.

Instead of firing Mr. Fredette, BVP arranged for Mr. Fredette to obtain a medical leave of absence in order to obtain treatment for his alcohol abuse. BVP allowed Mr. Fredette to sell back personal time so he would continue to be paid, and he began his leave that day.

On January 11, 1993, Mr. Fredette returned to the hotel to discuss the course of his treatment with Mr. Mitchell. For the first time, he also claimed that Mr. Sunshine had sexually harassed him, stating that this revelation had come to him during his visits with a psychologist. He cited various incidents he claimed were sexual harassment, none of which involved an allegation that Mr. Sunshine had made sexual advances toward Mr. Fredette or had directed other conduct specifically at Mr. Fredette. Rather, three alleged incidents concerned other Arthur's 27 employees, two were over two years old and two occurred during private parties at Mr. Fredette's house at which Mr. Sunshine was an invited guest. All of the alleged incidents concerned males.[1] Mr. Fredette neither claimed he had been

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[1] Fredette has alleged verbal and visual conduct of a homosexual nature, much of which was initiated by or participated in by other waiters. For example, one waiter, according to Fredette, claimed that engaging in oral sex with Mr. Sunshine ensured him favorable assignments. Another allegedly engaged in conduct such as pushing a candle up his rear end in front of others. There is no evidence that any of this conduct was anything more threatening or intimidating than horseplay. During the litigation, Mr. Fredette further alleged that Mr. Sunshine "repeatedly" propositioned him and other waiters.

harassed by a female employee nor said any female employees had been harassed.

After investigation, BVP issued Mr. Sunshine a stern warning despite his denials of the incidents alleged by Mr. Fredette. Mr. Fredette returned to work on January 21, 1993. No one directed any conduct of a sexual nature toward him nor did any employee do anything else he found to be offensive. Nonetheless, he promptly began to recruit other employees to join him in a lawsuit against BVP. He recruited these employees at work, on company time at Arthur's 27, and was eventually asked, not to cease pursuing his legal options, but only to stop causing disruptions at work.

On February 6, 1993, after only one week back at work, Mr. Fredette resigned his employment. He had already obtained a position as a captain at Christini's, another fine-dining restaurant in Orlando, and began work there the day after he left BVP.

REASONS FOR GRANTING THIS PETITION

The decision of the Eleventh Circuit in this case conflicts directly with the opinion issued by the Fifth Circuit in *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118 (5th Cir. 1996), *cert. granted*, in which this Court has already granted a writ of certiorari. 65 U.S.L.W. 3814 (June 9, 1997). Petitioner BVP respectfully requests that this Court also grant a writ of certiorari in the present case so that it may decide this case and *Oncale* together. In the alternative, Petitioner BVP requests that this Court hold this case and defer its ruling on this petition until this Court delivers its judgment in *Oncale*.

The question of whether "same-sex" sexual harassment is encompassed by Title VII's mandate against discrimination has surfaced repeatedly in recent years, and it will continue to arise frequently as the expression of sexuality in general and homosexuality in particular becomes more open and more widespread. Unfortunately, the appellate and district court

decisions on this issue have varied widely. Some have permitted plaintiffs to pursue their cases, usually on the theory that sexual harassment by one sex against the same sex is similar in consequence to harassment by one sex against the other. *See, e.g., Yeary v. Goodwill Industries-Knoxville, Inc.*, 107 F.3d 443 (6th Cir. 1997); *Quick v. Donaldson Co.*, 90 F.3d 1372 (8th Cir. 1996); *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir. 1996); *Blozis v. Mike Raisor Ford, Inc.*, 896 F. Supp. 805 (N.D. Ind. 1995); *Raney v. District of Columbia*, 892 F. Supp. 283 (D. D.C. 1995); *Nogueras v. University of Puerto Rico*, 890 F. Supp. 60 (D. P.R. 1995); *Griffith v. Keystone Steel and Wire*, 887 F. Supp. 1133 (C.D. Ill. 1995); *EEOC v. Walden Book Co., Inc.*, 885 F. Supp. 1100 (M.D. Tenn. 1995); *McCoy v. Johnson Controls World Services*, 878 F. Supp. 229 (S.D. Ga. 1995); *Prescott v. Independent Life and Accident Ins. Co.*, 878 F. Supp. 1545 (M.D. Ala. 1995); *Pritchett v. Sizeler Real Estate Mgmt.*, 67 F.E.P. Cases 1377 (E.D. La. 1995); *King*

v. M.R.Brown, Inc., 911 F.Supp. 161 (E.D. Pa. 1995); *Joyner v. AAA Cooper Transportation*, 597 F. Supp. 537 (M.D. Ala. 1983), *aff'd without opinion*, 749 F.2d 732 (11th Cir. 1984); *Wright v. Methodist Youth Services, Inc.*, 511 F. Supp. 307 (N.D. Ill. 1981).

By contrast, many courts have held that same-sex harassment cases do not involve discrimination by one sex against another and thus are not within the reach of Title VII, which specifically prohibits "discrimination." *See, e.g., McWilliams v. Fairfax County Bd. of Supervisors*, 72 F.3d 1191 (4th Cir.), *cert. denied*, 117 S.Ct. 72 (1996); *Oncale v. Sundowner Offshore Services, Inc.*, 83 F.3d 118 (5th Cir. 1996), *cert. granted*, 65 U.S.L.W. 3814 (June 9, 1997); *Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir. 1994); *Torres v. National Precision Blanking*, 943 F.Supp. 952 (N.D. Ill. 1996); *Schoiber v. Emro Marketing Co.*, 941 F.Supp. 730 (N.D. Ill. 1996); *Mayo v. Kiwest Corp.*, 898 F. Supp. 335 (E.D. Va.

1995), *aff'd without opinion*, 94 F.3d 641 (4th Cir. 1996); *Vandeventer v. Wabash National Corp.*, 887 F. Supp. 1178 (N.D. Ind. 1995) (on reconsideration); *Benekritis v. Johnson*, 882 F. Supp. 521 (D. S.C. 1995); *Fox v. Sierra Development Co.*, 876 F. Supp. 1169 (D. Nev. 1995); *Myers v. City of El Paso*, 874 F. Supp. 1546 (W.D. Tex. 1995); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822 (D. Md. 1994), *aff'd on other grounds*, 77 F.3d 745 (4th Cir. 1996); *Fleenor v. Hewitt Soap Co.*, 67 F.E.P. Cases 1625 (S.D. Ohio 1994), *aff'd on other grounds*, 81 F.3d 48 (6th Cir. 1996); *Goluszek v. Smith*, 697 F. Supp. 1452 (N.D. Ill. 1988).

Thus, the scope of Title VII in light of the intent of Congress is a question that can be resolved only by this Court. Indeed, guidance is particularly required because not all same-sex harassment cases involve similar fact situations. There are roughly two categories of such cases. One involves conduct sometimes referred to as "hazing." This kind of conduct can

involve remarks and conduct of a sexual nature but is not based on physical attraction and may even stem from a dislike of the victim. Moreover, such harassment is often committed by heterosexuals and is often of a violent or threatening nature.

This Court has already granted certiorari to decide the case of *Oncale v. Sundowner Offshore Services*, in which the conduct at issue involved supervisors and co-workers placing their penises on the plaintiff's body, threatening him with homosexual rape, and forcibly inserting a bar of soap between the "cheeks" of the plaintiff's buttocks. 83 F.3d 118 (5th Cir. 1996), *cert. granted*, 65 U.S.L.W. 3814 (June 9, 1997). It is unclear whether or not the perpetrators were actually homosexuals or were engaging in "hazing" conduct as a means of intimidating the plaintiff because they disliked him. If the latter, their decision to single out the plaintiff for intimidating treatment stemmed not from his gender but from his personality. It is only the form of the harassment that was sexual in nature,

not its cause. *See, e.g., Fleenor v. Hewitt Soap Co.*, 67 F.E.P. Cases at 1627-28 (holding that conduct including co-workers exposing themselves, threatening oral sex and pushing a ruler up the plaintiff's buttocks was non-actionable because there was no evidence that the plaintiff was harassed "because of" his sex); *Goluszek v. Smith*, 697 F. Supp. at 1379 (finding that the workplace environment was not discriminatory towards males as a gender but only toward the plaintiff himself). Some opinions, however, have permitted plaintiffs to sue under Title VII for such conduct, on the theory that its nature involves harassment of one gender to the exclusion of the other. *See, e.g., Quick v. Donaldson Co.*, 90 F.3d at 1379 (motioning toward or grabbing of co-workers' testicles was actionable because of necessity directed at men alone).

The second category of cases, by contrast, involves behavior committed by a homosexual against a person of the same gender. Thus, a fact pattern may involve sexual propositions, sometimes conditioning favorable terms of employment on the acceptance of such propositions, repeated remarks about the recipient's appearance and other behavior that serves to emphasize the recipient's sexuality. Such scenarios involve homosexual perpetrators who may be attracted to the recipient or who like to tease heterosexuals by flaunting their own homosexuality.

In the present case, the plaintiff has alleged that Dana Sunshine was homosexual and propositioned the plaintiff and other waiters for sexual favors and engaged in horseplay of a homosexual nature. There is no evidence that any female employees were ever treated to this kind of behavior. Opinions which have permitted such cases to go forward usually have cited this Court's opinion in *Meritor Savings Bank, F.S.B. v.*

Vinson, 477 U.S. 57 (1986), and held that the reason for such behavior is irrelevant, as long as the behavior is directed at the victim because of his or her gender. *See, e.g., Yeary v. Goodwill Industries-Knoxville,* 107 F.3d at 448 (finding by the court that since homosexual supervisor allegedly would not have directed similar conduct against a woman, the plaintiff was harassed "because of" his sex); *Wrighston v. Pizza Hut of America, Inc.*, 99 F.3d at 142-143 (noting that plaintiff properly alleged that his treatment by homosexual supervisors and co-workers would not have occurred but for the fact that he is male). The problem with such a theory is that it would apparently absolve bisexual perpetrators who harass members of both sexes. *See, e.g., Barnes v. Costle*, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977) ("In the case of the bisexual supervisor, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike."); *see also* Judge Bork's dissent from denial of

rehearing *en banc* in *Vinson v. Taylor*, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985), *aff'd sub nom Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57 (1986).

The current state of the law is thus extremely awkward. The cases in which "hazing" was found to be non-actionable depend upon a presumption that the conduct was not directed at the victim "because of" his or her sex, 42 U.S.C. § 2000e-2(a)(1), but simply because the victim was disliked. The cases in which harassment by a homosexual was held to be actionable depend upon a presumption that the conduct would not have been directed at persons of the other sex, a presumption that would exclude bisexual perpetrators alone from the reach of Title VII. Both results are unsatisfying.

CONCLUSION

It is urgent that this Court provide the lower courts and counsel with a ruling that would clarify the scope of Title VII. Petitioner BVP, therefore, urges this Court to grant certiorari in

the present case or, in the alternative, to hold this case until it rules in *Oncale*.

For the reasons stated, the Court should grant the petition for writ of certiorari.

Respectfully submitted

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APPENDIX

FREDETTE V. BVP MANAGEMENT ASSOCIATES

Robert FREDETTE,
Plaintiff-Appellant,
v. **No. 95-3242**
BVP MANAGEMENT ASSOCIATES,
Royal Palace Hotel Associates;
Buena Vista Hospitality Group,
Defendants-Appellees.

United States Court of Appeals
Eleventh Circuit
May 22, 1997

Male employee sued employer alleging hostile work environment and quid pro quo sexual harassment under Title VII and Florida Human Rights Act (FHRA). Employee also brought claim under Fair Labor Standards Act for retention of pooled tips. The United States District Court for the Middle District of Florida, No. 94-325-CIV-ORL-18, G. Kendall Sharp, J., 905 F.Supp. 1034, accepted in part the recommendation of Baker, United States Magistrate Judge, and granted in part and denied in part employer's motion for summary judgment. Employee appealed. The Court of Appeals, Anderson, Circuit Judge, held that sexual harassment of male employee by homosexual male supervisor was actionable under Title VII.

Reversed and remanded.

1. Civil Rights 158.1

Title VII's prohibition against gender discrimination is not limited to opposite gender discrimination; rather, it includes same gender discrimination. Civil Rights Act of 1964, §

703(a)(1), as amended, 42 U.S.C.A. § 2000-e(2)(a)(1).

2. Civil Rights 167

Sexual harassment of male employee by homosexual male supervisor was actionable under Title VII. Civil Rights Act of 1964, § 703(a)(1), as amended, 42 U.S.C.A. § 2000e-(2)(a)(1).

Appeal from the United States District Court for the Middle District of Florida.

Before ANDERSON, Circuit Judge, and KRAVITCH and HENDERSON, Senior Circuit Judges.

ANDERSON, Circuit Judge:

Appellant Robert Fredette brought this action against BVP Management Associates ("BVP"), alleging that Dana Sunshine, the male maitre d' or manager of BVP's restaurant, sexually harassed him in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, and in violation of the Florida Human Rights Act of 1977, as amended, Fla.Stat. Ch. 760 *et seq.*[1] BVP sought summary judgment, which the magistrate judge recommended be denied. The district court rejected the recommendation of the magistrate judge and granted summary judgment in favor of BVP, concluding that Fredette had not created an issue of fact regarding the causal element of his sexual harassment claim--i.e.,

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[1] Fredette originally sued other defendants as well as BVP, but as the case comes to us on appeal the only remaining defendant is BVP. Similarly, plaintiff originally also made a claim under the Fair Labor Standards Act, but that claim was settled and is no longer part of the case.

that the harassment occurred "because of sex." On appeal, appellee BVP argues that we should affirm the summary judgment because same-sex harassment claims are wholly outside the purview of Title VII. Because we disagree with both the district court and appellee, we reverse.

I. BACKGROUND

In the summary judgment posture of this case, the magistrate judge properly accepted Fredette's proffered evidence as true and resolved all reasonable inferences of fact in his favor. The district court, noting that BVP did not object to the magistrate judge's statement of the facts, accepted the facts as set out by the magistrate judge. For purposes of this appeal, we may abbreviate the statement of the facts, providing only enough to make it apparent that this appeal involves both quid pro quo sexual harassment and hostile environment sexual harassment arising from repeated instances of propositions for sexual favors. Fredette was a waiter in BVP's restaurant, and Mr. Sunshine, who is homosexual, was the maitre d' or manager. Fredette proffered evidence from which a factfinder could conclude that Fredette's supervisor, Mr. Sunshine, repeatedly propositioned him, offering employment benefits in exchange for Fredette's providing sexual favors to Mr. Sunshine, and when Fredette refused to comply and later reported the matter to management that Mr. Sunshine retaliated against Fredette in various work-related ways. There was similar evidence with respect to other male victims, and there was evidence that Mr. Sunshine provided work-related benefits to another male waiter who did accede to Mr. Sunshine's propositions.[2]

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[2] Although BVP does not set out a factual issue in its brief, it does attempt to belittle Fredette's proffered evidence amounting to quid pro quo harassment, arguing that the evidence made clear that Mr. Sunshine's propositions for

II. ISSUE

The single issue presented in this appeal is whether, under the circumstances of this case, the sexual harassment of a male employee by a homosexual male supervisor is actionable under Title VII.[3]

III. DISCUSSION

[1,2] We begin with the language of the statute. Title VII of the Civil Rights Act of 1964 reads in relevant part:

> It shall be an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex ....

42 U.S.C. § 2000e-2(a)(1). We note first that the statute prohibits an "employer," whether male or female, from discriminating against "any individual," whether male or female. There is simply no suggestion in these statutory terms that the

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sexual favors and his real or threatened retaliation were either "ludicrous" or mere "braggadocio." Suffice it to say that our review of the record readily persuades us that the magistrate judge did not err in concluding that there were genuine issues of fact in this regard. Thus, in the instant summary judgment posture, we must assume that the case involves quid pro quo harassment.

[3] The briefs on appeal assume that the Florida law claim will track the Title VII claim with respect to this issue. We accept the parties' assumptions, and accordingly our holding applies also to Fredette's claim under the Florida Human Rights Act.

cause of action is limited to opposite gender contexts. Next we focus on the statute's causation requirement--i.e., that the discrimination occurs "because of such individual's ... sex." In the paradigm harassment case, where a heterosexual male makes unwelcome advances toward a female, we have readily concluded that the harassment occurred "because of sex." In *Henson v. City of Dundee*, 682 F.2d 897 (11th Cir.1982), we said:

> In the typical case in which a male supervisor makes sexual overtones to a female worker, it is obvious that the supervisor did not treat male employees in a similar fashion. It will therefore be a simple matter for the plaintiff to prove that but for her sex, she would not have been subjected to sexual harassment.

Id. At 904. We think our observation in *Henson* is equally applicable to the situation where a homosexual male propositions another male. The reasonable inferred motive of the homosexual harasser are identical to those of the heterosexual harasser--i.e., the harasser makes advances towards the victim because the victim is a member of the gender the harasser prefers. Fredette proffered evidence from which a reasonable factfinder could conclude that he was the victim of sexual advances to which members of the opposite gender were not subjected. This was sufficient to survive summary judgment as to causation.

We next look to the legislative history of Title VII. Appellee has cited nothing, and we find nothing in the legislative history that suggests an express legislative intent to exclude same-sex harassment claims from the purview of Title VII. Instead, BVP argues by inference, suggesting that the legislative focus on discrimination against women by male-dominated employers indicates that Congress did not intend to provide a

remedy for same-sex harassment. The obvious Congressional focus on discrimination against women has not precluded the courts from extending the protections of Title VII to men. *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 681-82, 103 S.Ct. 2622, 2630, 77 L.Ed.2d 89 (1983) ("Male as well as female employees are protected against discrimination [under Title VII].") Similarly, we conclude that the legislative history does not preclude our holding that same-sex harassment, at least in the instant circumstances, is actionable under Title VII.

The EEOC's interpretation of Title VII provides further support for appellant's argument that same-sex sexual harassment is actionable in the instant circumstances.[4] The EEOC Compliance Manual states in relevant part:

> The victim does not have to be of the opposite sex from the harasser. Since sexual harassment is a form of sex discrimination, the crucial inquiry is whether the harasser treats a member or members of one sex differently from members of the other sex. The victim and the harasser may be of the same sex where, for instance, the sexual harassment is based on the victim's sex (*not* on the victim's sexual preference) and the

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[4] See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S., 57, 65, 106 S.Ct. 2399, 2404, 91 L.Ed.2d 49 (1986) ("[EEOC] Guidelines,'"while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance....'"" (quoting *General Electric Co. v. Gilbert*, 429 U.S. 125, 141-42, 97 S.Ct. 401, 410, 50 L.Ed.2d 343 (1976)) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164 89 L.Ed. 124 (1944))).

> harasser does not treat employees of the opposite sex the same way.

EEOC Compliance Manual (CCH) § 615.2(b)(3) (1987) (emphasis in original). The Compliance Manual in fact uses as an example of actionable same-sex harassment a case identical to the one before us today:

> Example 1--If a male supervisor of male and female employees makes unwelcome sexual advances toward a male employee because the employee is male but does not make similar advances toward female employees, then the male supervisor's conduct may constitute sexual harassment since the disparate treatment is based on the male employee's sex.

Id.

Looking to the relevant case law, we find that the Supreme Court has not addressed the issue of same-sex sexual harassment. The closest analogy in the Supreme Court case law involves reverse discrimination. In *Johnson v. Transportation Agency, Santa Clara County,* 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987), a male plaintiff brought a Title VII action for sex discrimination based on the county's decision to promote a female applicant to the position of road dispatcher. The facts of *Johnson* clearly show that the decision alleged to be discriminatory was made by another man. *Id.* At 624-26, 107 S.Ct. At 1448. Notwithstanding the fact that the allegation was one of same-sex discrimination, the Court addressed the merits of whether or not discrimination in violation of Title VII had taken place. *See also Wilson v. Bailey,* 934 F.2d 301 (11th cir.1991) and *McQuillen v. Wisconsin Educ. Ass'n Council,* 830 F.2d 659 (7th Cir.1987), *cert. denied,* 485 U.S. 914, 108 S.Ct. 1068, 99 L.Ed.2d 248 (1988) (both addressing the sex

discrimination claims of male plaintiffs without assigning any significance to the fact that the relevant employment decisions were made by another male). We recognize that the cited opinions do not squarely address the issue of whether same-sex gender discrimination is excluded from the compass of Title VII. However, we think the widespread acknowledgment of the viability of reverse-discrimination claims (which often involve the same-sex context) stands as an implicit rejection of BVP's position.

The viability of same-sex harassment claims is also an issue of first impression in this circuit.[5] While there is a split of authority amongst the circuits, and also amongst the district courts addressing the issue, we believe that the weight of the case law and the better-reasoned cases support the viability of the particular Title VII claim before us today.

In a case much like the instant case, involving a male victim and repeated sexual advances by a male homosexual, the Sixth Circuit has found an actionable Title VII claim. *See Yeary v. Goodwill Industries-Knoxville, Inc.*, 107 F.3d 443 (6th Cir.1997). To support its holding, the *Yeary* panel looked initially to the language of the statute, the rationale for the proscription against sexual harassment, and to the EEOC's Compliance Manual. In answer to the defendant's objection

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[5] *See Henson v. City of Dundee*, 682 F.2d 897, 905 n. 11 (11th Cir. 1982) (dicta) ("Except in the exceedingly atypical case of bisexual supervisor, it should be clear that sexual harassment is discrimination based upon sex."). *See also Joyner v. AAA Cooper Transp.*, 597 F.Supp. 537 (M.D.Ala.1983), *aff'd*, 749 F.2d 732 (11th Cir. 1984) (table) (unpublished, nonbinding decision affirming a district court finding of Title VII liability in a quid pro quo case involving advances made by a homosexual male supervisor towards a male employee).

that only "traditional" notions of sex discrimination are actionable under Title VII, the court wrote:

> [T]his case is about as traditional as they come, albeit with a twist. It is about an employee making sexual propositions to and physically assaulting a coworker because, it appears, he finds that coworker sexually attractive. This is a scenario that has been found actionable countless times over, when the aggressor is a male and the victim is a female. Likewise, there is no serious question that the same scenario would be actionable in the less typical case when the aggressor is a female and the victim is a male. Consequently, we find no substantive difference between either of those situations and that present here.

Id. At 447-48, As for Title VII's causation requirement, the court concluded that "when a male sexually propositions another male because of sexual attraction, there can be little question that the behavior is a form of harassment that occurs because the propositioned male is a male--that is, `because of sex.'" *Id.* At 448.

Similarly, the Fourth Circuit in *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138 (4th Cir.1996), held that a male employee could state a viable Title VII claim for sex discrimination against his employer on account of sexual harassment by his homosexual male supervisor. As we do, the Fourth Circuit relied upon the plain language of the statute, the case law expounding upon Title VII's causation requirement, and the EEOC's published interpretation of the statute. We note that the Fourth Circuit has drawn a distinction between cases involving sexual harassment of a male subordinate by a homosexual male perpetrator, i.e., *Wrightson*, and cases

involving a heterosexual male perpetrator and a male victim. In the latter context, the Fourth Circuit has found no viable Title VII claim. *McWilliams v. Fairfax County Bd. Of Supervisors,* 72 F.3d 1191 (4th Cir.), *cert. denied,*---U.S.---, 117 S.Ct. 72, 136 L.Ed.2d 32 (1996). The *McWilliams* panel found that the conduct in that case did not constitute harassment "because of" sex or gender, but rather constituted harassment because of the victim's perceived prudery, shyness, or other vulnerability. The distinction the Fourth Circuit has recognized is easily perceived. We readily understand a homosexual male's advances towards another male to occur "because of sex"; we understand this both out of common experience and in recognition of the parallels between this situation and the paradigm case of harassment involving a heterosexual male and a female victim, in which we have determined that the causation element of Title VII is easily met. Whether the kind of harassment as issue in *McWilliams*--i.e., heterosexual males' razzing and hazing of other males—occurs "because of sex" is a more difficult question, both in terms of common experience and law. Today, we need not decide that more difficult question; we meed only recognize that the hesitations underlying the Fourth Circuit's holding in *McWilliams* are not implicated by the case before us today.[6] *See Yeary,* 107 F.3d at 448 (deciding the case before the panel without resolving the question regarding the viability of same-sex harassment claims not involving homosexual advances).

A number of other circuits have suggested in dicta that same-sex Title VII claims might be viable at least in some circumstances. In a 1977 case recognizing a sex discrimination cause of action for quid pro quo harassment involving a female

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[6] We note that although the precise scope of the decision is somewhat unclear, the Eighth Circuit's decision in *Quick v. Donaldson Co., Inc.,* 90 F.3d 1372 (8th Cir.1996), could be construed to hold that a viable Title VII claim may be stated in circumstances like those involved in *McWilliams.*

employee and a male supervisor, the Court of Appeals for the District of Columbia suggested that similar claims involving parties of the same gender would also constitute actionable sex discrimination. *See Barnes v. Costle*, 561 F.2d 983, 990 n. 55 (D.C.Cir.1997) ("It is no answer [to the conclusion that the harassment at bar constituted sex discrimination] to say that a similar condition could be imposed on a male subordinate by a heterosexual female superior, or upon a subordinate of either gender by a homosexual superior of the same gender. In each instance, the legal problem would be identical to that confronting us now--the exaction of a condition which, but for his or her sex, the employee would not have faced.")[7] Similarly, the Third Circuit summarily rejected the argument that advances made toward a female employee were not sex discrimination because the male supervisor could also have propositioned male employees: "We would note that, although irrelevant, the situation posed in PSE&G's hypothetical would cause no great concern. Title VII prohibits discrimination against men as well as women." *Tomkins v. Public Serv. Elec.& Gas Co.*, 568 F.2d 1044, 1047 n. 4 (1977). The Seventh Circuit has noted, "Sexual harassment of women by men is the most common kind, but we do not mean to exclude the possibility that sexual harassment of men by women, or men by other men, or women by other women would not also be actionable in appropriate cases." *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995).[8] Finally, the Ninth Circuit has left the door open to

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[7] *See also Bundy v. Jackson*, 641 F.2d 934, 942 n. 7 (D.C.Cir.1981) (revisiting this passage in *Barnes* and noting that "in each instance the question is one of but-for causation: would the complaining employee have suffered the harassment had he or she been of a different gender?").

[8] *See also McDonnell v. Cisneros*, 84 F.3d 256, 260 (7th Cir.1996) ("Analysis is complicated by the fact that a difference is sex is not a necessary condition of sexual activity

same-sex harassment cases, noting in a hostile environment case brought by a woman, "[W]e do not rule out the possibility that *both* men and women working at Showboat have viable claims against Trenkle [a male supervisor] for sexual harassment." *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1464 (9th Cir.1994) (emphasis in original), *cert. denied*, 513 U.S. 1082, 115 S.Ct. 733, 130 L.Ed.2d 636 (1995).[9]

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and hence (most courts think) of sexual harassment.").

[9] Several judges in separate opinions have suggested that same-sex harassment may be actionable. *See Saulpaugh v. Monroe Community Hosp.*, 4 F.3d 134, 148 (2d Cir.1993) (Van Graafeiland, J., concurring) ("[H]arassment is harassment regardless of whether it is caused by a member of the same or opposite sex."), *cert. denied*, 510 U.S. 1164, 114 S.Ct. 1189, 127 L.Ed.2d 539 (1994). In *Hopkins v. Baltimore Gas and Elec. Co.*, 77 F.3d 745 (4th Cir.), *cert. denied*,--U.S.--, 117 S.Ct. 70, 136 L.Ed.2d 30 (1996), Judge Niemeyer addressed the viability of same-sex harassment claims, concluding that a plaintiff who could prove that he or she suffered otherwise actionable sexual harassment because of gender could state a claim regardless of the sex of the offender. *Id.* at 752. To Judge Niemeyer, the "more difficult question" was "what proof is necessary to demonstrate that harassment is because of the employee's gender . . ." *Id.* He concluded that where the harasser and the victim are of the same gender, a presumption exists that sexually suggestive conduct is not based on gender because "such sexually suggestive conduct [between members of the same gender] is usually motivated by entirely different reasons [than gender]." Judge Niemeyer contrasted this presumption to that present in opposite-sex harassment cases: "When someone sexually harasses an individual of the opposite gender, a presumption arises that the harassment is 'because of' the victim's gender. This presumption is grounded on the reality that sexual

Numerous district courts have concluded that same-sex harassment claims (both of the hostile environment and quid pro quo varieties) can be actionable under Title VII.[10]

Although we believe that the weight of the case law and the better-reasoned cases support Fredette's claim, there is a split in the circuits and in the case law. The only circuit court of

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conduct directed by a man, for example, toward a woman is usually undertaken because the target is female and the same conduct would not have been directed toward another male." *Id.* Judge Niemeyer concluded that in order to prevail in a Title VII action, the same-sex harassment plaintiff would have to overcome a presumption that the harassment was not based on sex. *Id. at 753.*

[10] *See, e.g., McCoy v. Macon Water Auth.*, --- F.Supp. ---(M.D.Ga. Feb. 5, 1997); *Williams v. District of Columbia*, 916 F.Supp. 1 (D.D.C. 1996); *Waag v. Thomas Pontiac, Buick, GMC, Inc.*, 930 F.Supp. 393 (D.Minn.1996); *Tanner v. Prima Donna Resorts, Inc.*, 919 F.Supp. 351 (D.Nev. 1996); *McCoy v. Johnson Controls World Servs., Inc.*,878 F.Supp. 229 (S.D.Ga.1995); *Prescott v. Indep. Life & Accident Ins. Co.*, 878 F.Supp. 1545 (M.D.Ala. 1995); *Raney v. District of Columbia*, 892 F.Supp. 283 (D.D.C. 1995); *Griffith v. Keystone Steel and Wire*, 887 F.Supp. 1133 (C.D.Ill. 1995); *Sardinia v. Dellwood Foods, Inc.*, 69 Fair Empl.Prac.Cas. (BNA) 705, 1995 WL 640502 (S.D.N.Y.1995); *King v. M.R.Brown, Inc.*, 911 F.Supp. 161 (E.D.Pa.1995); *Nogueras v. Univ. Of Puerto Rico*, 890 F.Supp. 60 (D.Puerto Rico 1995); *E.E.O.C. v. Walden Book Co., Inc.*, 885 F.Supp. 1100 (M.D.Tenn.1995); *Ecklund v. Fuisz Tech., Ltd.*, 905 F.Supp. 335 (E.D.Va.1995); *Joyner v. AAA Cooper Transp.*, 597 F.Supp. 537 (M.D.Ala.1983), *aff'd*, 749 F.2d 732 (11th Cir. 1984) (table); *Wright v. Methodist Youth Servs., Inc.*, 511 F.Supp. 307 (N.D.Ill.1981).

appeals adopting a position inconsistent with holding in favor of Fredette is the Fifth Circuit. *Oncale v. Sundowner Offshore Servs., Inc.*, 83 F.3d 118 (5th Cir.1996); *Garcia v. Elf Atochem North America*, 28 F.3d 446 (5th Cir.1994). The legal principle which apparently emerges from *Oncale* and *Garcia* is that "all same-sex sexual harassment claims" are barred. *Oncale*, 83 F.3d at 120. However, it is difficult to accord much persuasive force to these two decisions. The *Garcia* holding was the last of several independent and alternative holdings and was accompanied by no reasoning whatsoever. *Oncale* also provided no rationale to support the holding; rather, it limited its discussion to the reach of the cryptic *Garcia* opinion, specifically whether the relevant language in *Garcia* was dicta or binding precedent. The *Oncale* panel, recognizing the fact that indications in other circuit court opinions and many district court opinions were to the contrary, emphasized that it was bound by *Garcia*. Moreover, it seems from the statement of the facts in *Garcia* that the harassing conduct at issue there was similar in nature to that in *McWilliams*, i.e., teasing and harassment with sexually-focused speech or conduct, but *not* involving a male superior's solicitation of sexual favors from a male subordinate on condition of work benefits or detriment. In other words, the Fifth Circuit case law stems from a case that, for the reasons set out above, presented far more difficult questions than the one before us today.[11]

Many cases rejecting same-sex harassment claims rely upon *Goluszek v. H.P.Smith*, 697 F.Supp. 1452 (N.D.Ill.1988),

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[11] Although it is unclear from the brief statement of the facts in *Oncale* whether it might have involved homosexual solicitation of sexual favors on condition of work benefits or detriment, the court did not address the potential significance of that fact as explained in this opinion and in *Wrightson*.

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this category possibly including the Fifth Circuit case law.[12] While the facts in *Goluszek* clearly involve conduct of the kind involved in *McWilliams*, the *Goluszek* court relied upon an expansive rationale. According to the *Goluszek* court, a Title VII claim is viable only in a context where the work environment is dominated by members of one gender and the workplace environment is hostile to the other gender, i.e., treats members of the other gender as inferior. *Goluszek* stated that Congress was concerned with "an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discreet and vulnerable group." *Id.* At 1456. Some courts have followed the Goluszek decision closely, concluding that on the facts presented the plaintiff did not show an anti-male environment and therefore could not state a claim under Title VII.[13] Other decisions have accepted the broader language of the Fifth Circuit in *Garcia*, barring all same-sex harassment claims.[14]

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[12] Although *Garcia* includes no supporting rationale, it does cite *Goluszek*.

[13] *See Vandeventer v. Wabash Nat. Corp.*, 887 F.Supp. 1178 (N.D.Ind.1995); *Fleenor v. Hewitt Soap Co.*, 67 Fair Empl.Prac.Cas. (BNA) 1625, 1995 WL 386793 (S.D.Ohio 1994), *aff'd on other grounds*, 81 F.3d 48 (6th Cir.), *cert. denied*, --- U.S. ---, 117 S.Ct. 170, 136 L.Ed.2d 112 (1996)

[14] See *Schoiber v. Emro Marketing Co.*, 941 F.Supp. 730 (N.D.Ill.1996); *Torres v. National Precision Blanking*, 943 F.Supp. 952 (N.D.Ill.1996); *Benekritis v. Johnson*, 882 F.Supp. 521 (D.S.C.1995); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F.Supp. 822 (D.Md.1994), *aff'd on other grounds*, 77 F.3d 745 (4th Cir.), *cert. denied*, --- U.S. ---, 117 S.Ct. 70, 136 L.Ed.2d 30 (1996).

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We readily conclude that the *Goluszek* rationale is flawed.[15] The law is well established that Title VII protects men as well as women, without regard to whether the workplace is male-dominated. This is most obvious in cases involving male plaintiffs' challenges to affirmative action plans enacted to promote the advancement of women. Because employers typically adopt such plans precisely because the environment is male-dominated, the paradigm reverse-discrimination plaintiff is one whose workplace is dominated by members of his own gender. For example, in *Johnson v. Transportation Agency, Santa Clara County*, 480 U.S. 616, 107 S.Ct. 1442, 94 L.Ed.2d 615 (1987), the male plaintiff worked in a county transportation agency that had the following composition as of the year before the contested employment decision:

> Specifically, 9 of the 10 Para-Professionals and 110 of the 145 Office and Clerical Workers were women. By contrast, women were only 2 of the 28 Officials and Administrators, 5 of the 58 Professionals, 12 of the 124 Technicians, none of the Skilled Craft Workers [the classification of the position at issue in the case], and 1 ... of the 110 Road Maintenance Workers.

Id. At 634, 107 S.Ct. At 1453. However, we find no suggestion either in *Johnson* or in the other case law that such plaintiffs cannot state a viable Title VII claim simply because they work in an environment dominated by members of their

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[15] Of course, we do not mean to suggest that the situation described as actionable in *Goluszek*--i.e., harassment in an environment dominated by the opposite gender--is not actionable; we mean only to say that we do not agree it is the *only* situation that gives rise to a claim under Title VII.

own gender.[16]

Finally, we address concerns raised by the appellee regarding the implications of this case for the law regarding discrimination based on sexual orientation. BVP argues that to hold in favor of the appellant is, in effect, to protect against discrimination on the basis of sexual orientation. The short but complete answer to this argument is to make clear the narrowness of our holding today. We do not hold that discrimination because of sexual orientation is actionable. Rather, we hold today that when a homosexual male supervisor solicits sexual favors from a male subordinate and conditions work benefits or detriment on receiving such favors, the male subordinate can state a viable Title VII claim for *gender* discrimination. We note that the EEOC has also drawn a distinction between the conduct at issue here, which is actionable as gender discrimination, and discrimination because of sexual orientation. EEOC Compliance Manual (CCH) §

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[16] Similarly, we find no suggestion that white plaintiffs challenging racial affirmative-action programs cannot state viable Title VII claims simply because their workplace is dominated by members of their own race. In *United Steelworkers v. Weber*, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), the Supreme Court addressed the merits of a Title VII claim brought by white plaintiffs challenging a racial affirmative-action plan for a workplace where blacks held only 2% of the positions at issue and made up less than 15% of the entire workforce. See *Peightal v. Metropolitan Dade County*, 940 F.2d 1394 (11th Cir.1991) (considering the Title VII claims of a white male plaintiff regarding an affirmative-action plan adopted to promote women and racial minorities at a time when 75% of the firefighters in the department were white and 99% were male), *cert. denied*, 502 U.S. 1073, 112 S.Ct. 969, 117 L.Ed.2d 134 (1992).

615.2(b)(3) (1987).

IV. CONCLUSION

In summary, we conclude that the plain language of Title VII provides protection against the conduct at issue here where a homosexual male superior has solicited sexual favors from a male subordinate and conditioned work benefits or detriment on receiving such favors. We find nothing to the contrary in the legislative history. Our holding is in accord with the interpretation of the EEOC, and is in accord with the weight of the case law and the better-reasoned cases.

For the foregoing reasons, the judgment of the district court is reversed with respect to both the claim of quid pro quo sexual harassment and the claim for hostile environment sexual harassment. The case is remanded for further proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ROBERT FREDETTE,

v.

JUDGMENT IN A CIVIL CASE

BVP MANAGEMENT ASSOCIATES, et al

Case No. 94-325-CIV-ORL-18

___ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_√_ Decision by Court. This action came before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that the plaintiff take nothing on Counts I and III of the complaint and that the defendant BVP Management Associates recover of the plaintiff Robert Fredette its costs of action.

September 11, 1995
Date

David L. Edwards
Clerk

_____
(*By*) *Deputy Clerk*

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ROBERT FREDETTE,

Plaintiff,

v. Case No. 94-325-CIV-ORL-18

BVP MANAGEMENT ASSOCIATES,

Defendant.

_____/

ORDER

Robert Fredette (Fredette) brings this action against BVP Management Associates (BVP) for hostile work environment and *quid pro quo* discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964, as amended, (Title VII) 42 U.S.C. § 2000e, *et seq.* (1992) (Count I), and the Florida Human Rights Act of 1977, as amended, (FHRA) Fla. Stat. ch. 760, *et seq.* (1993) (Count III). Additionally, Fredette sues BVP for retention of pooled tips under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (1992) (Count II).

APPENDIX C

BVP filed a motion for summary judgment on all three counts, and Fredette responded in opposition. (Docs. 54, 66.) The court referred BVP's summary judgment motion to the United States Magistrate Judge for preparation of a report and recommendation. In his report and recommendation, the Magistrate judge recommends that the court deny the motion for summary judgment. BVP filed an objection to the report and recommendation, and Fredette filed a response to BVP's objection. (Docs. 94, 95.) Based on a review of the case file and relevant law, the court finds that Title VII and the FHRA do not provide a cause of action for discrimination based on sexual orientation or preference. Thus, BVP is entitled to summary judgment on Counts I and III of the complaint. However, as to Count II of the complaint, the court accepts the Magistrate Judge's recommendation and denies BVP's motion for summary judgment because genuine issues of material fact exist and render summary disposition inappropriate.

I. Facts

Upon review of the report and recommendation, the court adopts the Magistrate Judge's finding of facts. Further, the court notes that BVP does not object to the finding of facts but rather objects to the Magistrate Judge's application of the law to the facts.

II. Legal Discussion

A. *Standards of Review*

1. Report and Recommendation

Upon submission of a magistrate judge's report and recommendation on a motion for summary judgment, the court makes a *de novo* determination on the record of any portion of the magistrate judge's disposition to which a party has made a specific, written objection. Fed.R.Civ.P. 72(b); *E.E.O.C. v. Harris Chernin, Inc.*, 767 F.Supp. 919, 922 (N.D. Ill. 1991), *aff'd in part, reversed in part on other grounds*, 10 F.3d 1286 (7th Cir. 1993); *Manocchio v. Sullivan*, 768 F.Supp. 814, 816 (S.D. Fla. 1991). The court "must look at all the evidence

contained in the record and retains final authority over determination of the dispositive motion." *Harris Chernin*, 767 F.Supp. at 922. The court may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions. Fed R.Civ.P. 72(b); L. Rule 6.02(a), M.D. Fla.

2. Summary Judgment

Summary judgment is authorized if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "[T]he substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Anderson*, 477 U.S. at 248.

The moving party bears the burden of proving that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324-25 (1986). In determining whether the moving party has satisfied its burden, the court considers all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion, and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255; *see Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88 (1986). The moving party may rely solely on his pleadings to satisfy this burden. *Celotex*, 477 U.S. at 323-24; Fed.R.Civ.P. 56(c). "[T]here is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

B. Report and Recommendation

1. Counts I and III

The threshold issue underlying Counts I and III is whether Title VII and the FHRA support a claim of sexual discrimination among members of the same gender based upon one's sexual orientation or preference. The court concludes that neither statute supports such a claim.

Title VII and the FHRA both provide, in pertinent part, that it is unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ...sex...." *See* 42 U.S.C. § 2000e-2(a)(1); Fla. Stat. ch. 760.10(1)(a). Because the FHRA essentially mirrors Title VII, federal case law construing Title VII is applicable to the FHRA. *See Florida Dep't of Community Affairs v. Bryant*, 586 So.2d 1205, 1209 (Fla. Dist. Ct. App. 1991).

Title VII unquestionably protects men as well as women from discrimination and harassment on the basis of sex. *See*

e.g., *Henson v. City of Dundee*, 682 F.2d 897, 903 (11th Cir. 1982) (indicating that both men and women are protected groups for Title VII purposes). However, the determinative factor is that the discrimination or harassment would not have occurred "but for the fact of [the plaintiff's] sex." *Id.* at 904 (emphasis added). Further, the term "sex" as used in Title VII is not synonymous with "sexual preference." *E.g.*, *Ulane v. Eastern Airlines*, 742 F.2d 1081, 1082 (7th Cir. 1984), *cert. denied*, 471 U.S. 1017 (1985); *Sommers v. Budget Mktg, Inc.*, 667 F.2d 748, 750 (8th Cir. 1982) (per curiam); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979). In addition, unless otherwise defined, statutory language should be given its ordinary, common meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979). Thus, "the phrase in Title VII prohibiting discrimination based on sex, in its plain meaning, implies that it is unlawful to discriminate against women because they are women and against men because they are men." *Ulane*, 742 F.2d at 1085.

Consequently, "harassment by a male supervisor against a male subordinate does not [necessarily] state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination." *Garcia v. Elf Atochem North Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994); *see also Ulane*, 742 F.2d at 1084; *Benekritis v. Johnson*, 1995 U.S. Dist. LEXIS 5161 (D.S.C. Apr. 11, 1995) (following *Garcia*); *Meyers v. City of El Paso*, 874 F.Supp. 1546, 1548 (W.D. Tex. 1995) (same); *Vandeventer v. Wabash Nat'l Corp.*, 867 F.Supp. 790, 796 (N.D. Ind. 1994) (same); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F.Supp. 822, 833 (D. Md. 1994) (same); *but see Prescott v. Independent Life & Accident Ins. Co.*, 878 F.Supp. 1545, 1549-50 (M.D. Ala. 1995) (finding that Title VII protects against same sex sexual harassment); *McCoy v. Johnson Controls World Servs., Inc.*, 878 F.Supp. 229, 231-32 (S.D. Ga. 1995) (same); *Joyner v. AAA Cooper Transp.*, 597 F.Supp. 537, 541 (M.D. Ala. 1983), *aff'd without written op.*, 749 F.2d 732 (11th Cir. 1984).

The facts of this case show that the restaurant manager's attraction to Fredette stemmed from the fact that Fredette was a man. However, the discriminatory actions and threats complained of arose only after Fredette refused the manager's advances and innuendo. Further, nothing in the facts indicate that Fredette would have suffered the claimed discrimination had he accepted the manager's sexual advances. To the contrary, other male restaurant employees informed Fredette that he could get any table assignment or promotion he desired if he would honor the manager's requests.

Thus, if Fredette suffered the claimed harassment or discrimination at the hands of the restaurant manager, it stemmed not from the fact that Fredette was a man, but rather from the fact that Fredette refused the manager's propositions and did not share the same sexual orientation or preferences as the manager. Title VII does not provide a cause of action for discrimination or harassment levied because of one's sexual orientation or preference. *See Garcia*, 28 F.3d at 451-52;

Ulane, 742 F.2d at 1082; *Henson*, 682 F.2d at 901, 904 (finding that Title VII protects against discrimination based on one's "gender" or "the fact of [one's] sex"). Any expansion of Title VII or the FHRA that would include such a cause of action is for either Congress or the Florida legislature, and not this court, to make. Consequently, the court concludes that Fredette has not stated a claim under Title VII or the FHRA, which entitles BVP to summary judgment on Counts I and III of the complaint.

2. Count II

In Count II of his complaint, Fredette claims that BVP violated the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (1992), by allowing the restaurant manager to retain a share of the restaurant waiters' pooled tips. In his report and recommendation, the Magistrate Judge recommends that the court deny summary judgment on Count II because disputed issues of material fact remain. The court agrees, accepts the

Magistrate Judge's recommendation, and denies summary judgment as to Count II.

III. Conclusion

The court finds that Title VII and the FHRA do not provide a cause of action for discrimination or harassment based upon one's sexual orientation or preference. Further, the court finds no genuine issue of material fact that would justify bringing Counts I and III to trial. Accordingly, the court rejects the Magistrate Judge's recommendation, (Doc. 85), and GRANTS summary judgment in favor of BVP as to Counts I and III. As to Count II, the court accepts the Magistrate Judge's recommendation and DENIES summary judgment. The court directs the clerk of court to enter judgment in favor of BVP on Counts I and III of the complaint.

It is SO ORDERED in Orlando, Florida, this 11 day of September 1995.

G. KENDALL SHARP
United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

ROBERT FREDETTE,

Plaintiff,

-vs- Case No. 94-325-Civ-Orl-18

BVP MANAGEMENT ASSOCIATES
and DANA SUNSHINE,

DEFENDANTS.

TO THE UNITED STATES DISTRICT COURT

AMENDED
REPORT AND RECOMMENDATION

This cause came on for consideration without oral argument upon Defendant BVP Management Associates' Motion for Summary Judgment (Doc. No. 54) and Plaintiff's Opposition to Defendant's Motion (Doc. No. 66). Plaintiff Robert Fredette (hereinafter Mr. Fredette) brought this action against Defendants BVP Management Associates (hereinafter BVP) and Dana Sunshine (hereinafter Mr. Sunshine) for hostile

APPENDIX D

work environment and *quid pro quo* discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.* (1992) (Count I), and the Florida Human Rights Act of 1977, as amended, Fla. Stat. ch. 760, *et seq.* (1993)[1] (Count III), and against BVP for retention of pooled tips under the Fair Labor Standards Act, 29 U.S.C. § 201, *et seq.* (1992) (Count II). Thereon, the undersigned respectfully recommends that Defendant's motion be DENIED.

I. FACTS

Mr. Fredette was hired as a back waiter at Arthur's 27 Restaurant on April 28, 1989. Arthur's 27, so named because it is located on the twenty-seventh floor of the Buena Vista Palace Hotel in Lake Buena Vista, Florida, is operated by Defendant BVP. At the time of Mr. Fredette's hiring, Mr. Sunshine was the maitre d' or manager of Arthur's 27. In that

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Because the Florida Human Rights Act of 1977 is patterned after Title VII of the Civil Rights Act of 1964, federal case law regarding Title VII applies to it. *Florida Dep't of Community Aff. v. Bryant*, 586 So. 2d 1205, 1209 (Fla. Dist. Ct. App. 1991); *School Bd. of Leon County v. Hargis*, 400 So. 2d 103, 108 n.2 (Fla. Dist. Ct. App. 1981).

position, Mr. Sunshine had influence over the hiring, firing, scheduling, and teaming of waiters.

Mr. Fredette alleges that Mr. Sunshine, who is homosexual, began to make sexual advances toward him soon after his hiring.[2] Mr. Sunshine approached Mr. Fredette in a secluded area of the restaurant and told him that he knew a "good way" for Mr. Fredette to be promoted to captain. When Mr. Fredette responded that he preferred to be promoted because of hard work, Mr. Sunshine responded with a lewd gesture, said that "hard is exactly what it takes," and laughed. Soon afterward, Mr. Fredette voiced an objection to Mr. Sunshine's behavior. Mr. Sunshine told him that he could complain to personnel, but previous complaints had caused little harm to Mr. Sunshine's employment record. Despite refusing to engage in sexual behavior with Mr. Sunshine, Mr. Fredette was promoted to captain on November 28, 1989.

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Because this action comes before the Court on a motion for summary judgment, all unrebutted statements in Plaintiff's affidavit and deposition will be assumed true.

Over the course of Mr. Fredette's employment at Arthur's 27, Mr. Sunshine repeatedly propositioned him sexually. According to the sworn testimony of Mr. Fredette and several other former waiters, Mr. Sunshine would ogle and proposition male waiters, including Mr. Fredette. He would also make obscene gestures and gesticulations regularly. On several occasions when Mr. Fredette confronted him about his actions, Mr. Sunshine responded, "You can do what you want, but I control your income." Mr. Sunshine also apparently promoted a back waiter to captain and assigned him to profitable tables in exchange for sexual favors, despite the subordinate's lack of experience and seniority. When Mr. Fredette went to an assistant manager to complain about Mr. Sunshine's favoritism toward gay men, he was told that "the gay issue is a dead issue."

Mr. Sunshine also engaged in offensive sexual behavior in non-employment contexts. In social settings, he made sexual comments and suggestions to Mr. Fredette and engaged in

explicit sexual conduct. Mr. Sunshine's sexual partner also told Mr. Fredette and others that they could get better table assignments, and thereby better tips, by engaging in sexual conduct with Mr. Sunshine.

On December 31, 1992, Mr. Sunshine grabbed Mr. Fredette's arm, swung him around, and stared at his groin. He then made an obscene comment about Mr. Fredette's appearance. Mr. Fredette grew distraught at Mr. Sunshine's continuing unwanted attention. On January 3, 1993, Mr. Fredette became intoxicated at the bar adjacent to Arthur's 27 and caused a disturbance. As a result of his conduct, he was suspended from work for three days and required to seek alcohol abuse counseling and to undergo random drug tests.

On January 11, 1993, Mr. Fredette reported to David Mitchell, then human resources manger at the hotel. He told Mr. Mitchell that he had seen a counselor and lodged a sexual harassment complaint against Mr. Sunshine. Mr. Fredette enumerated a number of offensive sexual comments and acts

that Mr. Sunshine had committed. Later that day, another waiter verified many of Mr. Fredette's complaints. Max Suzenaar, then director of human resources at the hotel, met with Mr. Sunshine as a result of the complaints. Although Mr. Sunshine denied most of the allegations, he was issued a written warning. Over the next year, two other employees complained of sexual harassment by Mr. Sunshine. Approximately four years earlier, Mr. Suzenaar had received a complaint during the exit interview of Ralph Kraus, another waiter, which described sexual harassment by Mr. Sunshine. No action was taken upon Mr. Kraus's grievance.

After Mr. Fredette lodged a complaint with human services, his interaction with Mr. Sunshine and other waiters changed. Mr. Sunshine no longer harassed him sexually, but he began to enforce against Mr. Fredette workplace rules which had otherwise been unenforced. He reprimanded Mr. Fredette for having a veal bone misplaced and told him that he was not to speak to other waiters. Mr. Sunshine assigned Mr. Fredette

to fewer and worse-tipping tables. Another server, who Mr. Fredette contended was a confederate of Mr. Sunshine's, filed a complaint alleging that Mr. Fredette had threatened him. Mr. Fredette felt that the work environment was too difficult to withstand and, on the advice of his doctor, resigned on February 6, 1993.

II. GOVERNING LAW

A. Standard for Summary Judgment

Summary judgment is authorized if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). Summary judgment is appropriate only in circumstances where "the evidence is such that a reasonable jury could [not] return a verdict for the nonmoving party." *Id.* at 248; *accord Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving

party bears the burden of proving that no genuine issue of material fact exists. *Celotex*, 477 U.S. at 323. In determining whether the moving party has satisfied the burden, the court considers all inferences drawn from the underlying facts in a light most favorable to the party opposing the motion, and resolves all reasonable doubts against the moving party. *Anderson*, 477 U.S. at 255.

B. Motion for Summary Judgment

Defendant alleges that it is entitled to summary judgment on all three of Mr. Fredette's claims on five grounds. First, it contends that same-sex sexual harassment is not actionable under Title VII. Second, it claims that Plaintiff failed to set forth a claim for retaliation in his amended complaint and failed to exhaust administrative remedies upon such a claim. Third, it argues that Mr. Sunshine's alleged harassment failed to affect the terms and conditions of Plaintiff's employment, thereby negating Plaintiff's claim for *quid pro quo* harassment. Fourth, it contends that it was unaware of Mr. Sunshine's conduct prior

to Plaintiff's complaint and when it did learn of alleged harassment, it quickly took remedial action. Fifth, with regard to Mr. Fredette's Fair Labor Standards Act claim, it claims that Mr. Sunshine could receive a portion of tips, despite his management role.

1. Same-Sex Sexual Harassment

Defendant first contends that Plaintiff fails to state a proper cause of action in claims I and III because same-sex sexual harassment is not actionable under Title VII. Although some courts have held that a homosexual supervisor's sexual harassment of an employee of the same gender does not give rise to a cause of action under Title VII, others have held that it does. *Compare, e.g., Goluszek v. H.P. Smith,* 697 F.Supp. 1452 (N.D. Ill. 1988)(Same-sex sexual harassment is not actionable under Title VII); *with Prescott v. Independent Life & Accident Ins. Co.,* 878 F.Supp. 1545 (M.D. Ala. 1995) (Same-sex sexual harassment is actionable under Title VII). Neither the Supreme Court nor the Court of Appeals for the Eleventh

Circuit has ruled affirmatively on the issue. However, the Eleventh Circuit left open the possibility of such claims. *Henson v. City of Dundee*, 682 F.2d 897, 903-04 (11th Cir. 1982) (Requiring merely that the claimant stipulate to his or her sex and establish that "but for the fact of her sex, she would not have been the object of harassment."); *Walker v. NationsBank of Florida N.A.*, 1995 U.S. App. LEXIS 14914 (11th Cir. June 12, 1995) (applying modified *McDonnell Douglas* test).

Title VII of the Civil Rights Act of 1964 forbids an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin." 42 U.S.C. § 2000e(2)(a) (1988). The proscription of discrimination extends not only to an employer causing an employee direct economic harm because of his characteristics, or *quid pro quo* discrimination, but also to the creation of a hostile work environment. *Meritor Sav. Bank*,

FSB v. Vinson, 477 U.S. 57, 65-67 (1986). Pursuant to EEOC regulations, which are accorded broad deference,

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11(a) (1994).

The Supreme Court has determined that, because the language of § 2000e(2)(a) does not limit the scope of its protections to societal or workplace minorities, Title VII permits members of groups not traditionally disfavored to bring

actions to remedy "reverse discrimination." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976). In the context of discrimination on the basis of race, the Court unanimously held that Title VII's "terms are not limited to discrimination against members of any particular race," and, therefore, the Act "prohibits *all* racial discrimination in employment, without exception for any group of employees." *Id.* at 278-79, 283 (emphasis in original).[3] Courts, including the Court of Appeals for the Eleventh Circuit, have uniformly held that Title VII likewise prohibits sexual discrimination against men. *See, e.g., Wilson v. Bailey*, 934 F.2d 301 (11th Cir. 1991) (applying the *McDonnell Douglas* four-part test to a male employee's sex discrimination claim).

Those courts that have determined that Title VII provides no remedy for same-sex sexual harassment have done so on the basis of Congress's intent, not an interpretation of the

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In *Hopkins v. Baltimore Gas & Elec. Co.*, a district court in Maryland was "satisfied that 'racial harassment' is not a proper analogy for 'sexual harassment' in the Title VII context." 871 F.Supp. 822, 834 n.21 (D. Md. 1994).

explicit statutory language. Because the legislative history of Title VII reveals little with regard to discrimination on the basis of sex,[4] they have been forced to delve into judicial enforcement of Title VII and the congressional mindset for guidance.

In the only published appellate decision on the issue, the Fifth Circuit merely recited the holding of an earlier unpublished opinion. The Court summarily found that "harassment by a male supervisor against a male subordinate does not state a claim under Title VII even though the harassment has sexual overtones. Title VII addresses gender discrimination." *Garcia v. Elf Atochem N.Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994) (quoting *Giddens v. Shell Oil Co.*, No. 92-8533 (5th Cir. Dec. 6, 1993)). In addition, the Court cited an earlier district court

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[4] The prohibition against discrimination on the basis of sex was added to Title VII at the last minute on the floor of the House of Representatives. The principal argument in opposition to the amendment was that "sex discrimination" was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment. This argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on "sex."

Meritor Savings Bank v. Vinson, 477 U.S. at 63-64 (citations omitted).

case, *Goluszek v. H.P. Smith*, 697 F.Supp. 1452 (N.D. Ill. 1988).

In *Goluszek*, the Court addressed the issue of same-sex sexual harassment *sua sponte* to find that a male employee's complaints of other employees' workplace comments about the plaintiff's sexual activities were not actionable. The Court based its holding on the policy Congress had intended to promote in adopting Title VII: equal employment opportunity through freedom from discriminatory workplace intimidation. 697 F.Supp. at 1456. It then suggested that "[t]he discrimination Congress was concerned about when it enacted Title VII is one stemming from an imbalance of power and an abuse of that imbalance by the powerful which results in discrimination against a discrete and vulnerable group." *Id.* (citing Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 Harv. L. Rev. 1449, 1451-52 (1984)). Therefore, for harassment to be actionable under Title VII, the offender must express through words or deeds that the victim is

inferior because of her sex. *Id.* According to the Court, there could be no such problem for a male in a male-dominated work environment, for there could be no anti-male environment in the workplace.

Further cases finding no liability for a homosexual supervisor's harassment of a subordinate have uniformly cited *Garcia* and *Goluszek*. *Benekritis v. Johnson*; 1995 U.S. Dist. LEXIS 5161 (D.S.C. Apr. 11, 1995) (adopting the reasoning of *Garcia* and *Goluszek*); *Myers v. City of El Paso*, 874 F.Supp. 1546 (W.D. Tex. 1995) (following *Garcia*); *Vandeventer v. Wabash Nat'l Corp.*, 867 F.Supp. 790 (N.D. Ind. 1994) (adopting the holding of *Garcia* and *Goluszek*); *Hopkins v. Baltimore Gas & Electric Co.*, 871 F.Supp. 822 (D. Md. 1994) (adopting the reasoning of *Garcia* and *Goluszek*). Recently, however, a number of district courts have rejected the reasoning of *Goluszek* and found that Title VII protects against same-sex sexual harassment. *EEOC v. Walden Book Co.*, 1995 U.S. Dist. LEXIS 6049 (M.D. Tenn. May 5, 1995); *Pritchett v. Sizeler*

Real Estate Mgm't Co., 1995 U.S. Dist. LEXIS 5565 (E.D. La. Apr. 25, 1995); *Boyd v. Vonnahmen*, 1995 U.S. Dist. LEXIS 7452 (S.D. Ill. Mar. 29, 1995); *Prescott v. Independent Life & Accident Ins. Co.*, 878 F.Supp. 1545 (M.D. Ala. 1995); *McCoy v. Johnson Controls World Servs., Inc.*, 878 F.Supp. 229 (S.D. Ga. 1995); *see also Joyner v. AAA Cooper Transp.*, 597 F.Supp. 537 (M.D. Ala. 1983), *aff'd without written op.*, 749 F.2d 732 (11th Cir. 1984); *Wright v. Methodist Youth Services, Inc.*, 511 F.Supp. 307 (N.D. Ill. 1981).

In those cases in which the courts have held that Title VII supports a claim for same-sex sexual harassment, the opinions have been based upon the plain language of the statute, analogy to other Title VII causes of action, and prevention of all discriminatory harassment. While Congress may have intended to remedy the problem of inequality in the workplace by passing Title VII, it did not do so by prohibiting discrimination only against minorities. Rather, it proscribed discrimination on the basis of, *inter alia*, sex, with no limitation on the gender of the

harasser or the harassed. *Prescott*, 878 F.Supp. at 1550. Indeed, courts have held without controversy that a male employee could bring a cause of action against a female supervisor under Title VII. *Wilson*, 934 F.2d at 304. The determinative factor is that the harassment would not have occurred "but for" the employee's gender. *Id; Wilson*, 934 F.2d at 304. Thus where this causal link exists, it makes little analytical sense to imply a restriction on Title VII based solely upon the sexuality of the harassing supervisor. *EEOC*, 1995 U.S. Dist. LEXIS 6049 at *9; *Pritchett*, 1995 U.S. Dist. LEXIS 5565 at *6.

Goluszek asserted that a male need not have a remedy under Title VII for discrimination in a male-dominated environment. However, it is the employee discriminated against, not the discriminating supervisor, who is the proper focus for inquiry. Regardless of the sexual orientation or gender of the supervisor, Title VII would fail to fulfill its goal of equal employment opportunity if it were to permit supervisors to

harass employees with impunity. The employee would, because of his or her gender and the supervisor's attention thereto, be denied the opportunity to work in an environment free of discrimination on the basis of sex. Therefore, Title VII properly provides for a cause of action to remedy same-sex sexual harassment.

2. Retaliation under Title VII

Defendant also argues that Plaintiff fails to state a claim for retaliation under Title VII. It contends that Plaintiff failed to plead such a cause of action in his amended complaint and failed to allege such a claim in his charge before the EEOC. In addition, Defendant claims that Plaintiff was subject to no retaliatory acts.

On the charging form that he filed with the EEOC on July 2, 1993, Mr. Fredette did not check the box which would indicate that his charge was based on retaliation. However, he did not check the box to indicate that his charge was based on discrimination on the basis of sex either. Instead, he checked

the box labeled "other" and specified "sexual harassment." In the affidavit Mr. Fredette appended to his charge, he stated that Mr. Sunshine threatened his job if he discussed his complaints of discrimination with anyone else; Mr. Fredette also stated that the head of security said that he was surprised that no one had broken Mr. Fredette's kneecaps.

While Mr. Fredette failed to indicate explicitly that he was charging BVP with discrimination on the basis of sex and retaliation, both could be reasonably inferred from his factual allegations. The permissible scope of a civil action based upon an EEOC charge is governed by the "like or related" rule first articulated in *Sanchez v. Standard Brands, Inc.*, 431 F.2d 455 (5th Cir. 1970).[5] Under the rule, "the allegations in a judicial complaint filed pursuant to Title VII 'may encompass any kind of discrimination like or related to the allegations contained in the charge and growing out of such allegation during the

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All decisions rendered by the Fifth Circuit before October 1, 1981 are binding as precedent upon courts of the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

pendency of the case before the Commission.'" *Id.* at 466 (quoting *King v. Georgia Power Co.*, 295 F.Supp. 943, 947 (N.D. Ga. 1968)); *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 589 n.8 (11th Cir.), *cert. denied*, __U.S.__, 115 S.Ct. 298 (1994). The Supreme Court refined the rule, stating, "Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable." *General Tel. Co. v. EEOC*, 446 U.S. 318, 331 (1980).

The EEOC forwarded Mr. Fredette's charge to BVP in the course of its investigation. In doing so, it put BVP on notice of each of the allegations charged and asked BVP to respond to the allegations. While the EEOC did classify Plaintiff's charge as being on the basis of sex, Defendant could reasonably infer that it would be held to respond to all of the factual allegations in the charge. The allegations of post-complaint actions could be properly considered the basis for a legal claim for retaliation under Title VII.

In his amended complaint before this Court, Plaintiff stated that "he suffered a hostile work environment and discrimination on account of his sex." He detailed allegations of retaliatory conduct, but did not suggest that they were independently actionable. Nonetheless, the other filings and discovery in this case have plainly shown that Mr. Fredette has been pursuing a retaliation claim. The failure to set forth a conclusionary statement as to one basis for a claim in the amended complaint is not a ground for denying possible relief.

3. Quid Pro Quo Discrimination

Defendant suggests that, even if same-sex sexual harassment were actionable, Plaintiff's claim for *quid pro quo* harassment fails. Defendant presents evidence that Plaintiff was one of the highest paid servers at Arthur's 27 for his entire tenure, and concludes therefrom that he suffered no economic detriment. Defendant also suggests that because it did not terminate Plaintiff when it could have done so with cause, the facts do not support a finding that Defendant altered the terms

of Plaintiff's employment. *See Virgo v. Riviera Beach Assocs, Ltd.*, 30 F.3d 1350, 1362 (11th Cir. 1994) ("Quid pro quo sexual harassment occurs when an employer changes an employee's conditions of employment because of their refusal to submit to sexual demands.")

However, Defendant's conclusion that Plaintiff's conditions of employment were not altered for refusing to engage in sexual activities with Mr. Sunshine is but one of two reasonable interpretations of the facts alleged. While Defendant's evidence that Plaintiff was one of the most highly compensated servers at Arthur's 27 is unquestioned, it does not create the insurmountable inference that Plaintiff could not have earned more. Plaintiff presented deposition testimony that suggests that Mr. Sunshine offered, in exchange for sexual favors, to help Plaintiff earn more by assigning him to better-tipping tables. The existence of two such competing, reasonable inferences creates a genuine issue of material fact. In addition, Defendant's suggestion that it could have terminated Plaintiff

earlier is irrelevant. Although it had cause to terminate Plaintiff's employment, Defendant made the decision to retain him. Such a decision has no bearing upon earlier conditions of employment, nor would it justify submitting Plaintiff to unlawful discrimination after he was retained. Therefore, summary judgment would be inappropriate upon Plaintiff's claim of *quid pro quo* discrimination.

4. Hostile Work Environment and Constructive Discharge

Defendant also argues that Plaintiff's claim for constructive discharge and hostile work environment fails regardless of potential liability for same-sex sexual harassment. Defendant contends that Plaintiff has not proven constructive discharge in that the working conditions at Arthur's 27 were not so intolerable that he was forced to resign. Defendant suggests that Plaintiff cannot support a claim for hostile work environment because BVP neither knew nor should have known of the harassment. In addition, Defendant contends that it took swift action to remedy the problems of workplace harassment.

"[W]hen 'an employee involuntarily resigns in order to escape intolerable and illegal employment requirements' to which he or she is subjected because of race, color, religion, sex, or national origin, the employer has committed a constructive discharge in violation of Title VII." *Henson*, 682 F.2d at 907 (quoting *Young v. Southwestern Sav. & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975)). To prove constructive discharge, the former employee must demonstrate that his working conditions grew so intolerable that a reasonable person in his position would feel compelled to resign. *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993), *cert. Denied*, __U.S.__, 114 S.Ct. 2708 (1994).

Plaintiff does not allege any further episodes of sexual harassment after his complaint to the human resources division. Instead, he alleges that Mr. Sunshine began to enforce restaurant rules against him stringently, despite not having enforced the rules against others. He claims Mr. Sunshine refused to permit him to speak to other servers and assigned him

to fewer tables. He also contends that one of the other waiters, at Mr. Sunshine's behest, filed a complaint against Mr. Fredette.

The evidence of this conduct is sufficient to create a genuine issue of material fact as to constructive discharge pursuant to a claim of retaliation.

Sexual harassment gives rise to a cause of action under Title VII if it is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor Sav. Bank*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 904) (alteration in original). An employer is not strictly liable for a hostile work environment; "liability exists where the [employer] knew or should have known of the harassment and failed to take prompt remedial action against the supervisor." *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989); *see also Meritor Sav. Bank*, 477 U.S. at 72.

Defendant contends that harassment at Arthur's 27 was not pervasive because only Mr. Sunshine was alleged to have

harassed employees and only one employee filed a complaint against Mr. Sunshine before Mr. Fredette did. That argument is without merit in light of the severity of the alleged harassment and several subsequent complaints. Defendant also contends that it did not know or have reason to know that Mr. Sunshine had harassed employees before Mr. Fredette's complaint and took prompt remedial action afterward.

Despite Defendant's claim of ignorance of Mr. Sunshine's behavior, Plaintiff submitted deposition testimony in which Ralph Kraus testified that he had earlier complained of sexual harassment by Mr. Sunshine. Defendant was therefore on notice of accusations of Mr. Sunshine's sexual harassment, but failed to take any action at that time. The circumstances give rise to a genuine issue of material fact as to whether Defendant had actual or constructive knowledge of Mr. Sunshine's harassing behavior. Defendant then took prompt action after Plaintiff's complaint of harassment. However, whether that action could be construed as reasonable remedial

action, especially in light of the previous complaint and the severity of harassment alleged, gives rise to a question of fact. Accordingly, summary disposal of Plaintiff's claim of hostile work environment would be improvident.

5. Fair Labor Standards Act Claim

The Fair Labor Standards Act (hereinafter FLSA) establishes minimum wage and maximum hours standards. Under the FLSA, an employer must pay each employee a wage of not less than $4.25 per hour. 29 U.S.C. § 206(a)(1) (1988). With regard to a tipped employee, the employer may count tips as up to 50 percent of the employee's minimum wage, although the wage credit taken for tips may not exceed the tips the employee actually received. 29 U.S.C. § 203(m) (1988). However, the employer may not count tips as any part of the minimum wage unless the employee retains all tips that he receives, except to the extent that tips are pooled "among employees who customarily and regularly receive tips." *Id.* In a June 21, 1974 opinion letter, the Acting Administrator of the

Wage and Hour Division of the Department of Labor interpreted the "tip wage credit" provision of the FLSA. In doing so, the Acting Administrator opined that tip pools in which employers take part are invalid and render the tips unsuitable for consideration as part of a minimum wage credit. *Dole v. Continental Cuisine, Inc.*, 751 F.Supp. 799, 802 (E.D. Ark. 1990).

Plaintiff claims that he and other servers contributed to a tip pool from which Mr. Sunshine took one percent of the proceeds. He further contends that Mr. Sunshine was an employer, and therefore ineligible to participate in the tip pool under the FLSA. Although Defendant does not deny Plaintiff's allegations as to the tip pool, it argues that Mr. Sunshine was not an employer and could lawfully share in the tip pool.

Under the FLSA, "any person acting directly or indirectly in the interest of an employer in relation to an employee" is considered an employer. 29 U.S.C. § 203(d) (1988). Whether an individual is an employer is determined by

the "economic reality" of the circumstances. *Donovan v. New Floridian Hotel, Inc.*, 676 F.2d 468, 470 (11th Cir. 1982); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947). Factors to be considered in that decision include how much control the alleged employer exerted over the employees and whether the alleged employer could hire and fire workers and modify their working conditions. *Aimable v. Long & Scott Farms*, 20 F.3d 434, 439 (11th Cir.), *cert. denied*, __U.S.__, 115 S.Ct. 351 (1994); *Leach v. Johnston*, 812 F.Supp. 1198, 1207 (M.D. Fla. 1992); *Hodgson v. Griffith and Brand of McAllen, Inc.*, 471 F.2d 235, 237-38 (5th Cir.), *cert. denied*, 414 U.S. 819 (1973).

Plaintiff contends that Mr. Sunshine was able to hire, fire and schedule servers and allocated their stations and thereby influenced their income. Defendant alleges that Mr. Sunshine could recommend the hiring or firing of servers but did not have final authority. It is unclear how strictly Mr. Sunshine controlled the scheduling of servers at Arthur's 27.

Although a maitre d' would traditionally take part in a tip pool, it is unclear if Mr. Sunshine's role was limited to that of a traditional maitre d'. *Dole*, 751 F.Supp. at 801 ("In the restaurant business, a maitre d' customarily participates in a tip pool."). Plaintiff's allegations would support an inference that he was also the manager of Arthur's 27, with additional supervisory duties. In that role, he may have had sufficient discretion and control over employment decisions to be considered an employer. A genuine issue of material fact exists as to Mr. Sunshine's duties, and summary judgment upon the FLSA claim would therefore be inappropriate.

III. CONCLUSION

The undersigned respectfully recommends that Defendant's motion be DENIED.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten (10) days from the date of its filing shall bar an aggrieved party from attacking the factual findings on appeal.

Respectfully recommended in Orlando, Florida on this 6th day of July, 1995.

DAVID A BAKER
UNITED STATES MAGISTRATE JUDGE